

CLE SEMINAR

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**Reviewing the Supreme Court  
2004-2005 Term  
from a Defense Perspective**

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## Table Of Contents

Trial Rights Under The Fifth And Sixth Amendments .....	1
<i>United States v. Booker</i> , 125 S. Ct. 738 (2005) .....	1
<i>Deck v. Missouri</i> , 125 S. Ct. 2007 (2005) .....	4
<i>Smith v. Massachusetts</i> , 125 S. Ct. 1129 (2005) .....	5
<i>Johnson v. California</i> , 125 S. Ct. 2410 (2005) .....	6
Eighth Amendment And Capital Sentencing .....	7
<i>Roper v. Simmons</i> , 125 S. Ct. 1183 (2005) .....	7
<i>Smith v. Texas</i> , 125 S. Ct. 400 (2004) .....	8
Fourth Amendment Search And Seizure .....	8
<i>Illinois v. Caballes</i> , 125 S. Ct. 834 (2005) .....	8
<i>Muehler v. Mena</i> , 125 S. Ct. 1465 (2005) .....	9
<i>Devenpeck v. Alford</i> , 125 S. Ct. 588 (2004) .....	10
<i>Brosseau v. Haugen</i> , 125 S. Ct. 596 (2004) .....	11
Other Constitutional Provisions .....	12
<i>Gonzales v. Raich</i> , 125 S. Ct. 2195 (2005) .....	12
<i>Halbert v. Michigan</i> , 125 S. Ct. 2582 (2005) .....	13
<i>Wilkinson v. Austin</i> , 125 S. Ct. 2384 (2005) .....	15
<i>Johnson v. California</i> , 125 S. Ct. 1141 (2005) .....	15
Statutory Construction -- Immigration Law .....	16
<i>Leocal v. Ashcroft</i> , 125 S. Ct. 377 (2004) .....	16
<i>Clark v. Martinez</i> , 125 S. Ct. 716 (2005) .....	17
<i>Jama v. Immigration and Customs Enforcement</i> , 125 S. Ct. 694 (2005) .	19
Statutory Construction -- Crimes In General .....	19
<i>Shepard v. United States</i> , 125 S. Ct. 1254 (2005) .....	19
<i>Small v. United States</i> , 125 S. Ct. 1752 (2005) .....	20
<i>Arthur Andersen v. United States</i> , 125 S. Ct. 2129 (2005) .....	21
<i>Whitfield v. United States</i> , 125 S. Ct. 687 (2005) .....	22
<i>Pasquantino v. United States</i> , 125 S. Ct. 1766 (2005) .....	22

Habeas Procedure .....	23
<i>Wilkinson v. Dotson</i> , 125 S. Ct. 1242 (2005) .....	23
<i>Howell v. Mississippi</i> , 125 S. Ct. 856 (2005) .....	24
<i>Rhines v. Weber</i> , 125 S. Ct. 1528 (2005) .....	24
<i>Pace v. DiGuglielmo</i> , 125 S. Ct. 1807 (2005) .....	25
<i>Dodd v. United States</i> , 125 S. Ct. 2478 (2005) .....	26
<i>Johnson v. United States</i> , 125 S. Ct. 1571 (2005) .....	27
<i>Mayle v. Felix</i> , 125 S. Ct. 2562 (2005) .....	28
<i>Bell v. Thompson</i> , 125 S. Ct. 2825 (2005) .....	29
<i>Gonzales v. Crosby</i> , 125 S. Ct. 2641 (2005) .....	30
Habeas Substance .....	31
<i>Rompilla v. Beard</i> , 125 S. Ct. 2456 (2005) .....	31
<i>Florida v. Nixon</i> , 125 S. Ct. 551 (2004) .....	31
<i>Brown v. Payton</i> , 125 S. Ct. 1432 (2005) .....	32
<i>Bradshaw v. Stumpf</i> , 125 S. Ct. 2398 (2005) .....	33
<i>Bell v. Cone</i> , 125 S. Ct. 847 (2005) .....	34
<i>Miller-El v. Dretke</i> , 125 S. Ct. 2317 (2005) .....	35
<i>Medellin v. Dretke</i> , 125 S. Ct. 686 (2005) .....	36

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**REVIEWING THE SUPREME COURT 2004-2005 TERM  
FROM A DEFENSE PERSPECTIVE**

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This Term has had an unusual array of cases that will affect the practice of federal criminal defense. In going through the opinions to look for hidden gems, three major themes emerge. First, the protection of core constitutional rights has solidified in a surprising number of cases. Second, the Doctrine of Constitutional Avoidance continues to provide a key analytical framework for federal litigation. Lastly, the Court's devotion of so much time to the rules of statutory construction emphasizes the need for federal defense attorneys to incorporate them into our litigation vocabulary. The overall message is to hit constitutional issues hard, but layer them with statutory arguments that avoid the necessity of resolving the constitutional questions.

**Trial Rights Under The Fifth And Sixth Amendments**

***United States v. Booker*, 125 S. Ct. 738 (2005): The Sixth Amendment applies to enhancement factors under the federal sentencing guidelines, but the remedy is to construe the guidelines to be advisory, rather than mandatory, and provide appellate review for unreasonableness.**

In the Court's first word on the federal sentencing guidelines post-*Blakely*, a fragmented court reached two related holdings through two different 5-4 majorities. The end result is that the federal guidelines are no longer binding on federal sentencing courts, and sentences will be reviewed on appeal for unreasonableness. The *Booker* holdings apply to all cases on direct review.

In the first opinion, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, the Court held that the Sixth Amendment -- as construed in *Blakely v. Washington*, 542 U.S. 269 (2004) -- applies to the federal sentencing guidelines. The second opinion, known as the remedial opinion, authored by Justice Breyer, and joined by the first opinion dissenters plus Justice Ginsburg, held that Congress intended that, if the Sixth Amendment applied to guideline enhancements, the provisions that make the federal guidelines mandatory would be severed and discarded. Upon the elimination of mandatory guideline language in two sections, the federal guidelines are effectively advisory: a sentencing court must consider the guideline ranges but should also consider the other sentencing concerns set out in 18 U.S.C. § 3553(a). The resulting sentence is subject to appellate review for reasonableness.

*Booker* leaves a number of critical issues that are still being litigated:

- *Retroactivity*: Although the Ninth Circuit has rejected application of *Blakely* to cases on collateral review in *Schardt v. Payne*, 414 F.3d 1025 (9th Cir. 2005), the Supreme Court has not resolved this question. (<http://circuit9.blogspot.com/2005/07/schardt-misreading-of-schriro.html>)
- *Ex Post Facto*: The Ninth Circuit has rejected the argument that the Due Process Clause's general presumption against retroactivity, which relies on lack of notice and foreseeability, prohibits the retroactive application of *Booker*. *United States v. Dupas*, 419 F.3d 916 (9th Cir. 2005). However, the statutory argument that the stricter Ex Post Facto Clause should apply to the non-mandatory guidelines in the same way that it would apply to a guideline amendment remains open. (<http://circuit9.blogspot.com/2005/08/dupas-redux-reasonable-doubt-at.html>)
- *Reasonable Doubt*: The standard of proof for controverted facts remains an open question. Compare *United States v. Ameline*, 407 F.3d 646, 656 n.7 (9th Cir. 2005) (leaving for future litigation the continued validity of *United States v. Howard*, 894 F.2d 1085, 1089 (9th Cir. 1990)) and *United States v. Stewart*, 420 F.3d 1007, 1022 n.14 (9th Cir. 2005) (leaving to the sentencing court on remand whether reasonable doubt is the required standard for a post-*Booker* sentencing enhancement), with *United States v. Dare*, 2005 WL 2319653 (9th Cir. Sept. 23, 2005) (citing to *Howard* in dicta for the preponderance

standard). Briefing is available from the Ninth Circuit Blog in the summary of entries on reasonable doubt. The Doctrine of Constitutional Avoidance can also be used to reach the reasonable doubt standard. Several district courts have applied the reasonable doubt standard to controverted sentencing facts. *See, e.g., United States v. Okai*, 2005 WL 2042301 (D. Neb. Aug. 22, 2005); *United States v. Pimental*, 367 F. Supp. 2d 143, 152 (D. Mass. 2005); *United States v. Siegelbaum*, 359 F. Supp. 2d 1104, 1107-08 (D. Or. 2005). (<http://circuit9.blogspot.com/2005/09/us-v.html>)

- *Evidentiary Hearing*: Although the Ninth Circuit has indicated that the Sixth Amendment's right to confrontation does not apply at sentencing, *Sandoval-Huerta v. Castro*, 140 Fed. Appx. 670 (9th Cir. 2005), the due process requirement of confrontation and other evidentiary protections should apply. (<http://circuit9.blogspot.com/2005/04/crawford-meets-booker-right-to.html>)
- *Booker Remand*: The Ninth Circuit in *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), leaves to the district court the initial question whether plain error requires vacation when a Sixth Amendment violation occurs in the absence of objection.

*Booker I* also gives us help on questions of *stare decisis*. The Ninth Circuit made clear in *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) that, where intervening Supreme Court authority undercuts the theory or reasoning of prior circuit precedent, the court is not barred by the earlier cases. In *Texas v. Cobb*, 532 U.S. 162, 169 (2001), the Court stated, "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." Following this line of thought, the *Booker* Court distinguished away four of its previous cases, each of which appeared to tacitly approve the guidelines. 125 S. Ct. at 753-54. This aspect of *Booker* comes into play every time we urge a court not to follow pre-*Apprendi* and pre-*Blakely* precedent based on the evolving Sixth Amendment line of cases.

***Deck v. Missouri*, 125 S. Ct. 2007 (2005): The use of visible physical restraints during sentencing violates due process unless the trial court has assessed the risk in the individual case.**

This is a classic battle between Justice Breyer's living Constitution and Justice Scalia's originalism. This round goes to life, but not without a fight. After a conviction and sentence to death, the state court reversed the sentence and remanded for a new penalty phase. Mr. Deck was shackled before the jury during the new penalty proceedings. Justice Breyer started his opinion by determining whether visible shackling, in the absence of a special need, violates the Constitution (although courts have long found just such a rule based on *Holbrook v. Flynn*, 475 U.S. 560 (1986), and *Illinois v. Allen*, 397 U.S. 337 (1970)). His methodology included a look to Blackstone and the common law, followed by a survey of state and federal decisional law. The limits of discretion stated in *Allen* and *Flynn*, as well as consensus dating from the 19th century, led the Court "to now conclude" that due process prohibits the use of visible physical restraints in the absence of a state interest specific to a particular trial.

In extending this due process protection to the guilt phase, Justice Breyer examined whether the rationale for the rule applied. Three issues underlie the rule: 1) "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process;" 2) "The use of physical restraints diminishes [the right to counsel];" and 3) "The use of shackles at trial affronts the dignity and decorum of judicial proceedings that the judge is seeking to uphold." With no mention of *Ring v. Arizona*, 536 U.S. 584 (2002), the Court finds these factors apply with "like force" to the penalty phase. The trial court's failure to treat the shackling question as one calling for individualized discretion constituted error, which the state had the burden of proving beyond a reasonable doubt "did not contribute to the verdict obtained."

Justice Scalia, joined by Justice Thomas, dissented, pointing out the original concerns regarding shackling related to the infliction of pain, as documented by citation to *Manacles Of The World: A Collector's Guide To International Handcuffs, Leg Irons And Other Miscellaneous Shackles And Restraints*. Justice Scalia then provided originalist rebuttal to this emerging due process right, heavily documenting the use of shackles and the absence of consensus on the issue (presaging the battle over *Roper v. Simmons*, *infra*).

The finding of a due process right to be free from shackling during the sentencing phase raises the question whether we should return to the battle over use of shackling during federal sentencing hearings – the rationale of *Deck* is only weakly linked to jury involvement.

***Smith v. Massachusetts*, 125 S. Ct. 1129 (2005): Absent a rule authorizing mid-trial reconsideration, jeopardy attached when the trial court judge granted the Massachusetts equivalent of a motion for a judgment of acquittal.**

Justice Scalia, joined by Justices Stevens, O’Connor, Souter, and Thomas, found that the Double Jeopardy Clause barred mid-trial reconsideration of a motion for acquittal. Although double jeopardy traditionally applied only after a jury verdict, Justice Scalia applied the Court’s broader definition of acquittal: any order that actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. Here, the Massachusetts rule called for a required finding on the defendant’s motion for a not guilty verdict, but did not expressly provide for reconsideration of such a ruling.

Mr. Smith was tried by jury trial for assault with intent to murder, assault and battery with a dangerous weapon, and unlawful possession of firearm. After the prosecution rested without proving the length of the gun, the trial judge granted Mr. Smith’s motion for a required finding of not guilty on the unlawful possession charge. Before the judge ruled, she indicated there was a problem in the proof, and the prosecutor stated an intention to present additional evidence, but no further evidence was presented, so the court granted the motion. Shortly thereafter, the prosecutor submitted case authority that evidence of the type of weapon was sufficient to establish its length. The trial judge changed her mind and submitted the charge to the jury, who convicted.

Justice Scalia found that the trial judge’s initial ruling met the definition of acquittal because the state rule authorized the judge to determine the sufficiency of the evidence. The Court carefully circumscribed its ruling to the particular procedural rule, which did not provide for reconsideration. The Court noted that States are permitted to create procedures for reconsideration of mid-trial determinations of insufficiency, either legislatively or by case authority. Or the court can be provided discretion to defer ruling until after the jury returns its verdict, as in Rule 29(b). Footnote 7 makes explicit that, despite the dissent’s concern that the acquittal was legally wrong, “requiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause – even when the acquittal was erroneous because the evidence was sufficient.”

October 24, 2005

Page 6

Justice Ginsburg, joined by the Chief Justice and Justices Kennedy and Breyer, dissented, finding no prejudice, no state rule barring reconsideration, and no reason not to allow the judge to correct her error on the same day she made it.

The *Smith* case has some potentially useful language on functional analysis of legal questions: the name of the procedure does not matter, only its effect as a de facto judgment of acquittal. 125 S.Ct. at 1134. This analysis may have useful habeas applications. In a case with similarities to *Smith*, Judge Brown granted habeas relief on double jeopardy grounds where the state trial court judge received a partial jury verdict on the lesser included offense, and then permitted the jury to recommence its deliberations on the same offense. *Colin v. Lampert*, 233 F. Supp. 2d 1293 (D. Or. 2002).

***Johnson v. California*, 125 S. Ct. 2410 (2005): At the first step of a *Batson* challenge, the defendant need only establish an inference of discriminatory purpose in the use of peremptory challenges, no proof by a preponderance of the evidence.**

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court set out three steps for determining whether a peremptory challenge is based on impermissible group bias: 1) the defendant must make out a *prima facie* case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose;” 2) the burden shifts to the State to offer permissible race-neutral justifications for the strikes; then (3) the trial court must decide whether the defendant has proved purposeful racial discrimination. California interpreted *Batson* to permit a state court to require the defendant to establish that racial discrimination was “more likely than not.” The Court, in an opinion authored by Justice Breyer, rejected this additional obstacle, finding that the first step needed only “evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” Because Mr. Johnson was black, and all three black prospective jurors were removed with peremptory challenges, the defendant established the required inference. Only Justice Thomas dissented, who would have allowed the States the flexibility to fashion less protective schemes.

Footnote 6 of the majority opinion is worth keeping in mind. The Court posited the unlikely possibility that the prosecution provides no race-neutral justification. Rather than having only the initial inference, and therefore less than a preponderance, the Court noted that the evidence would also include the prosecutor’s refusal to justify the strike as requested by the court. “Such a refusal would provide additional support for the inference of discrimination raised by a defendant’s *prima facie* case.”

## **Eighth Amendment And Capital Sentencing**

***Roper v. Simmons*, 125 S. Ct. 1183 (2005): Under the Eighth Amendment, the execution of juvenile murderers constitutes cruel and unusual punishment.**

Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, revisit the question of whether the execution of persons who committed murder as juveniles violated the Eighth Amendment. Mr. Simmons committed a brutal murder when he was seventeen years old and received a death sentence nine months later at the age of eighteen. Although the Court had upheld such a sentence sixteen years earlier in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court overruled *Stanford* based on “evolving standards of decency.” This inquiry included history, tradition, and precedent regarding juvenile executions, with the increase in the number of States barring this practice as an important factor. The Court’s analysis also disclaimed the *Stanford* plurality (including Justice Kennedy) that rejected “the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty.” In finding that a national consensus has developed against the execution of juveniles, the present Court relied not only on legislation and cases but on social science and -- most controversially -- international law. As the Court reconsidered and condemned execution of the mentally retarded in *Atkins v. Virginia*, 536 U.S. 304(2002), the Court now has reconsidered and condemned the execution of juvenile murderers.

Justices Stevens and Ginsburg concurred to note that Justice Scalia’s originalism would permit the execution of seven-year-old children. Justice O’Connor dissented to object to the proposition that juries cannot find some juveniles worthy of execution. Justice Scalia’s bitter dissent, joined by the Chief Justice and Justice Thomas, defends *stare decisis* – the overruling of *Stanford* is not because it was wrongly decided but because the Constitution has changed – and attacks the anti-democratic use of judicial power to trump legislative and jury determinations. Justice Scalia saves special venom for the Court’s reference to the international community in determining the Constitution’s meaning, especially Anglophilia in light of Great Britain’s abandonment of many of the procedural protections now ensconced in the Bill of Rights.

***Smith v. Texas*, 125 S. Ct. 400 (2004): At a capital sentencing, the court’s “nullification” jury instruction violated the Eighth Amendment because it permitted the jury to consider mitigation evidence only by returning a false answer to the special issues.**

This per curiam opinion tells the Texas courts that the Court really meant it in *Penry v. Johnson*, 532 U.S. 782 (2001), when it held unconstitutional nullification instructions, which dilute the requirement that juries give full consideration and effect to mitigating circumstances. The key defect in the instruction is the mixed message to consider mitigating circumstances at the same time as requiring special answers on the death questions:

Just as in *Penry II*, petitioner’s jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in *Penry II*, the burden of proof on the State was tied to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented. . . . [T]he “jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.”

*Smith*, 125 S. Ct. at 407 (quoting *Penry II*, 532 U.S. at 801). The Court emphasized that the mitigation need not tend to negate an aggravating factor. Justices Scalia and Thomas filed a perfunctory dissent.

## **Fourth Amendment Search And Seizure**

***Illinois v. Caballes*, 125 S. Ct. 834 (2005): A dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment as long as it does not extend the duration of the stop.**

In a case probably skewed by the War on Terror, Justice Stevens approved the use of a narcotics detection dog during a lawful stop for speeding. Based on the dog’s alert, the officers searched the trunk and found marijuana. The dog sniff did not violate the Fourth Amendment because an individual does not have a protected Fourth Amendment interest in concealing his possession of contraband. Because the dog sniff could only reveal the possession of contraband, and because the use of the dog did not extend the duration of the stop, no Fourth Amendment intrusion occurred. In addition to upholding the dog sniff, the Court also upheld the search of the trunk because the dog, though fallible, was sufficiently reliable to establish probable cause.

Justice Souter and Justice Ginsburg each authored forceful dissents. Justice Souter argued that a dog sniff should fall under Fourth Amendment protection because it provides officers with information about the contents of private spaces beyond anything that human senses can perceive. Furthermore, since even well-trained dogs are not infallible, the dog sniff amounts to a search under the Fourth Amendment. Justice Ginsburg argued that the dog sniff in this case violated the Fourth Amendment because it was not reasonably related in scope to the circumstances justifying the intrusion, as required by *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Although the dog sniff did not extend the duration of the stop, Justice Ginsburg argued that the action changed the character of the encounter from a traffic stop to a drug search.

Both Justice Souter and Justice Ginsburg relied on the specter of suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots. Both, however, hinted that the situation would be different if trained dogs were used to detect explosives. Justice Ginsburg stated, “[T]he immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine.” Justice Souter agreed: “All of us are concerned not to prejudice a claim of authority to detect explosives and dangerous chemical or biological weapons that might be carried by a terrorist who prompts no individualized suspicion.”

In future cases, the defense focus will be on whether the dog sniff extended the duration of the stop, which both majority and dissent emphasized did not occur here, and the qualifications of the individual dog and trainer as being sufficiently reliable (and trained to detect only items that are contraband per se).

***Muehler v. Mena*, 125 S. Ct. 1465 (2005): Officers executing a search warrant have the categorical authority to detain occupants of a home for the duration of the search.**

In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court approved detention of “the occupants of the premises while a proper search is conducted.” In this civil rights case, Ms. Mena was detained for several hours while a SWAT team executed a search warrant at her residence. The warrant was based on suspicion that a gang member involved in a drive-by shooting lived at that address. SWAT team members handcuffed Mena at gunpoint and placed her in a converted garage, still in handcuffs, for two to three hours. During the search, INS agents questioned Mena regarding her immigration status.

Writing for five justices, Chief Justice Rehnquist held that the authority to detain occupants of a house for the entire duration of a search is categorical and does not depend on any quantum of proof justifying the detention. The Court also held that the use of the handcuffs was more intrusive than merely detaining her in the garage, but that the marginal intrusion was justified in this case by the officer's safety concerns because they were searching the house of a suspected gang member for weapons. The fact that the handcuffs remained in place for the duration of the search was reasonable under the circumstances because only two armed officers were available to detain the four occupants of the home.

Justice Kennedy joined the majority opinion, but he also concurred separately to emphasize that the holding applied only to the facts of this case. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, concurred in the judgment to remand, but argued that the officers' decision to keep Ms. Mena in handcuffs for the duration of the search was not objectively reasonable because she posed no threat to the officers.

All nine justices agreed that the officers' interrogation of Ms. Mena about her immigration status could not have violated her Fourth Amendment rights because questioning alone does not constitute a seizure as long as it does not extend the duration of a lawful detention. As in *Caballes*, litigation in this area is likely to focus on whether the interrogation was beyond the scope of the lawful detention.

***Devenpeck v. Alford*, 125 S. Ct. 588 (2004): When determining the validity of a stop, the court is not limited to considering the offense cited by an arresting officer at the time of arrest and offenses "closely related" to that offense.**

Officer Devenpeck arrested Jerome Alford for violating the Washington Privacy Act because he tape recorded his conversation with police officers during a traffic stop. Even though the officers had probable cause to arrest Mr. Alford for impersonating a police officer and obstruction, they only referred to the privacy matter as the reason for arrest. The Ninth Circuit concluded that the arrest was unlawful because tape recording a traffic stop is not a crime in Washington and because the other crimes were not "closely related" to the offense cited by the officer at the time of arrest.

Justice Scalia reversed for a unanimous Court, reinforcing the rule from *Whren v. United States*, 517 U.S. 806 (1996), that the objective existence of probable cause is the only question on the validity of an arrest and that subjective intent is generally irrelevant. Officers

are under no obligation to state any offense at all in order to take a defendant into custody as long as the officer has probable cause for an arrestable offense. If officers were subjected to the Ninth Circuit's "closely related" requirement, the purposes of the Fourth Amendment would not be furthered because officers could simply state no offense at all or list every possible basis for every arrest.

***Brosseau v. Haugen*, 125 S. Ct. 596 (2004): Separate from the constitutionality of an officer's use of deadly force against an unarmed felony suspect, the courts had not "clearly established" the right in question, in a particularized sense, to the facts presented to foreclose qualified immunity for the officer.**

In another reversal of a Ninth Circuit civil rights case, the Court per curiam found an officer to be protected by qualified immunity. Officer Rochelle Brosseau went to the home of Kenneth Haugen, who was suspected of selling drugs and stealing the tools of a co-worker. When Haugen saw Officer Brosseau approach, he jumped in his Jeep, and ignored the officer's warnings to stop, even when she smashed a hole in the window of his Jeep. Brosseau shot Haugen in the back as he drove away, and Haugen subsequently filed a suit for damages under 42 U.S.C. § 1983. The Court of Appeals held that Brosseau violated Haugen's Fourth Amendment rights and also that she was not entitled to qualified immunity.

The Supreme Court reversed only on the qualified immunity question because the law of when an officer may shoot a fleeing suspect was not clearly established with the particularization necessary to apply it to this set of facts. The Court's holding in *Brosseau* substantially extends qualified immunity by encompassing excessive force cases where the law has not been previously applied to particular facts. Here, even though past cases had clearly established that officers may only shoot a fleeing suspect who presents a risk to others, the Court held that in this case, "Brosseau's actions fell in the 'hazy border between excessive and acceptable force.'" (Quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

This case includes an echo of the Doctrine of Constitutional Avoidance. In footnote 3, the majority finds no reason to reconsider *Saucier*'s order of proceeding: 1) first decide the constitutional question; 2) then decide the qualified immunity question. Justice Breyer, joined by Justices Ginsburg and Scalia, concurred to say that *Saucier* should be reconsidered because, if the question is iffy enough for qualified immunity, why reach the "difficult constitutional questions when there is available an easier basis for the decision"?

## **Other Constitutional Provisions**

***Gonzales v. Raich*, 125 S. Ct. 2195 (2005): The Commerce Clause does not prevent the federal government from using the Controlled Substances Act to prosecute intrastate growers and users of marijuana for medical purposes.**

Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, find that the Necessary and Proper Clause and the Commerce Clause vest Congress with the power to prohibit local cultivation and use of marijuana in compliance with California law. The Court placed a clear limit on the reach of its prior Commerce Clause cases of *United States v. Lopez*, 514 U.S. 936 (1995), striking down a statute punishing gun possession near schools, and *United States v. Morrison*, 529 U.S. 598 (2000), striking down legislation punishing violence against women. The Court traced the history of drug legislation through the Controlled Substance Act (CSA), which provided a comprehensive regime for the control of drugs.

The Court found that this case could be resolved based on a previous case upholding New Deal legislation regarding wheat. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court had upheld regulation of home-consumed wheat because the consumption had a substantial influence on national prices and market conditions. The Court distinguished *Morrison* and *Lopez* because those cases involved subject matter wholly outside Congress' commerce power, not a comprehensive regulatory scheme involving actions in the heartland of Commerce Clause authority. The *Lopez* and *Morrison* statutes did not involve economic activity, unlike drug trafficking. The Court relied on the Supremacy Clause to require deference to the federal government's interest, which overcame the medical interests of the state. Justice Stevens questioned the wisdom of the rule, but ultimately left the question to administrative reclassification of marijuana or the democratic process of corrective legislation.

Justice Scalia concurred separately to explain that the third category of permitted regulation under the Commerce Clause – activities that substantially affect interstate commerce (the others being channels and instrumentalities of interstate commerce) – is misleading and incomplete: “Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities *that do not themselves substantially affect interstate commerce.*” 125 S. Ct. at 2216 (Scalia, J., concurring) (emphasis added).

Justice O'Connor, joined by the Chief Justice and Justice Thomas, found that the majority opinion reduced *Morrison* and *Lopez* to "little more than a drafting guide," because statutes could easily be written to fall into the majority rule and thus survive Commerce Clause scrutiny, while still encroaching on "historic spheres of state sovereignty."

***Halbert v. Michigan*, 125 S. Ct. 2582 (2005): The Due Process and Equal Protection Clauses require appointment of appellate counsel for first-tier appellate review, even where that review is not a matter of right.**

Justice Ginsburg authored an important affirmation of the importance of appointed counsel for the indigent accused. Under the Michigan appeals statute, criminal defendants who plead guilty or *nolo contendere* do not have an automatic right of appeal to the Michigan Court of Appeals. Instead, those defendants must file an application for leave to appeal, and they must normally do so on a *pro se* basis. If the Court of Appeals grants the leave to appeal, then an appellate attorney is appointed for the defendant. In denying applications for leave to appeal, the Court of Appeals uniformly cites "lack of merit in the grounds presented" as the basis for its decision."

The Court defined the case as falling into the gap created by the Supreme Court's previous holdings in *Douglas v. California*, 372 U.S. 353 (1963), in which the Court required appointed counsel where the statute created a first-tier direct appeal as a matter of right, and *Ross v. Moffitt*, 417 U.S. 600 (1974), in which the Court held that second-tier discretionary review by the state supreme court did not require appointed counsel. The majority held that two key characteristics of first-tier appellate review required adherence to the rule of *Douglas*, even where the review is discretionary. First, the application for leave to appeal "necessarily entails some evaluation of the merits of the applicant's claim." Second, while the leave for application to appeal represents the "first, and likely the only, direct review" of the defendant's claims, parties in that position are ill-equipped to represent themselves.

There are several pieces to the Court's opinion that are worth keeping in mind.

- *Waiver*: Over a strong dissent, the Court found no waiver of the right to appeal despite the following colloquy: "You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right." "Yes, sir." The Court noted, "At the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed

appellate counsel he could elect to forego.” We should look to *Halbert* for help on issues involving purported appellate and post-conviction waivers.

- *Brandeis Briefing*: Justice Ginsburg relied on extensive statistical information regarding the low intelligence, poor education, and mental illness of many prisoners in finding that the guidance of counsel was necessary. This is a good reminder to support constitutional positions with policy arguments, where appropriate, supported by facts.
- *Role of Counsel*: The Court noted the efficiency of providing indigents with appellate counsel based on the need to comprehend claims on appeal and the availability of *Anders* briefing in the absence of non-frivolous issues.
- *Right to Appeal*: The Court accepted as a starting point an 1894 case where the Court had held that the federal Constitution imposes no state obligation to provide any appellate review of criminal convictions. This premise should be challenged in light of more recent evolution precedent on procedural due process.

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would defer to the state legislative decision not to expend resources on guilty plea cases, especially where a) fewer resources may be available to innocent defendants who lose at trial, and b) the state may decide to provide no appeal at all. They also would find waiver – but not before noting that, “There may be some nonwaivable rights: ones ‘so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts.’” Like the reasonable doubt standard?

***Wilkinson v. Austin*, 125 S. Ct. 2384 (2005): Placement in a state super max prison implicates a liberty interest under the Fourteenth Amendment’s Due Process Clause, but the State’s procedures for placement were adequate to protect that interest.**

Current and former inmates of the Ohio State Prison filed suit under 42 U.S.C. § 1983 challenging the State’s policies for transferring prisoners from lower security facilities to the super max prison. Ohio conceded that the transfer procedures in place from 1999 to 2002, when the suit was brought, were imprecise. On the eve of trial, Ohio promulgated a new policy for transfer that involved notice to the prisoner of the grounds for transfer and an opportunity to be heard before a committee. Witnesses and other evidence were prohibited.

Justice Kennedy, writing for a unanimous Court, held that inmates have a state-created liberty interest in avoiding transfer to OSP because the assignment imposes an atypical and significant hardship under any plausible baseline standard. The Court noted that the super max assignment was for an entire year without review, and in addition, the assignment would disqualify inmates for parole. Because the procedures emphasized both notice and an opportunity to be heard, the Ohio procedures adequately protected the inmates liberty interests. But, “[i]f an inmate were to demonstrate that the New Policy did not in practice operate in this fashion, resulting in a cognizable injury, that could be the subject of an appropriate future challenge.” The *Austin* opinion includes a useful review of the “liberty interest” protected by the Due Process Clause, distinguishing guarantees implicit in the word “liberty” and interests or expectations created by state (or federal) laws or policies.

***Johnson v. California*, 125 S. Ct. 1141 (2005): California’s unwritten policy of segregating prisoners by race upon initial transfer to a prison is subject to strict scrutiny under the Equal Protection Clause.**

Justice O’Connor, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, authored an opinion that, like *Deck* on shackling, firmed up a constitutional right that seemed settled. “[W]e explicitly reaffirm what we implicitly held in [*Lee v. Washington*, 390 U.S. 333 (1968)]: The necessities of prison security and discipline . . . are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities.”

The California Department of Corrections (CDC) had an unwritten policy of racially segregating prisoners in double cells for up to 60 days each time they enter a new

correctional facility. The CDC policy was based on the asserted rationale that it prevents violence caused by racial gangs. Mr. Johnson, an African-American inmate, had been intermittently double-celled under the policy since his 1987 incarceration. He challenged the policy on the grounds that it violated his Fourteenth Amendment right to equal protection.

The five-justice majority held that “strict scrutiny” is the proper standard for review because the racial classification is “immediately suspect.” California argued that an exception to the strict scrutiny standard should be made because of the uniqueness of the prison setting. The Court refused to permit the exception, especially because the federal government and other states regulate prison violence without resort to the policies of racial segregation. The Court remanded the case to the Ninth Circuit to rule on the merits of the equal protection claim under the strict scrutiny standard.

Justice Ginsburg, joined by Justices Souter and Breyer, concurred to opine that the same standard would not be applied to affirmative action to “correct inequalities.” Justice Stevens dissented because the record established the Equal Protection violation, Justice Thomas dissented because the Constitution’s diminished effect behind prison walls allowed the State to segregate for safety’s sake.

## **Statutory Construction -- Immigration Law**

***Leocal v. Ashcroft*, 125 S. Ct. 377 (2004): In construing the immigration statute’s definition of “aggravated felony,” which refers to the 18 U.S.C. § 16 definition of “crime of violence,” the alien’s state conviction for driving under the influence resulting in serious bodily injury is not a predicate offense because it required neither proof of criminal intent nor the use of physical force against the person or property of another.**

An Immigration Judge ordered Josue Leocal deported after his conviction for driving under the influence of alcohol and causing serious bodily injury. The IJ classified Mr. Leocal’s conviction as a crime of violence under 18 U.S.C. § 16, and therefore an “aggravated felony” under 8 U.S.C. § 101(a)(43)(F). A crime of violence is an offense “that has as an element the use . . . of physical force against the person or property of another” or that “by its nature involves a substantial risk that physical force against the person or property of another may be used . . . .” 18 U.S.C. § 16(a), (b).

Chief Justice Rehnquist wrote for a unanimous Court. Starting with the requirement that words be given their “ordinary and natural” meaning, the Court found that “use...of physical force against” required a higher degree of intent than the negligence permitted under the state statute. The Court then backed up the analysis to the ordinary meaning of a “crime of violence,” which “suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.” In footnote 8, the Court buttressed its interpretation of the statute by applying the rule of lenity, even though this is an administrative law case. The Court relied on the same reasoning later employed in *Clark v. Martinez*, 125 S. Ct. 716 (2005), when it noted that statutory language cannot be construed to have more than one meaning depending on the context in which it is applied. Noting that the definition of “crime of violence” has both criminal and noncriminal applications, the Court found: “Because we must interpret the statute consistently whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.”

*Leocal* is a key case because, for the past decade, the government has pushed the absolute limits of what constitutes an “aggravated felony,” with the onerous consequences in both immigration and criminal law that ensue. We should be looking with fresh eyes on these expansive, Alice-in-Wonderland constructions.

<http://circuit9.blogspot.com/2005/09/thompson-fourth-circuit-demonstrates.html>

***Clark v. Martinez*, 125 S. Ct. 716 (2005): Under the Doctrine of Constitutional Avoidance, an immigration detention statute, which had been previously construed to limit post-removal-period detention of removable aliens to six months, cannot be construed differently to authorize indefinite detention of inadmissible aliens such as Mariel Cubans.**

In *Zadvydas v. Davis*, 533 U.S. 688 (2001), the Supreme Court by a 5-4 vote interpreted the Immigration and Nationality Act to limit the time that the government may detain aliens who have been found removable to the time reasonably necessary to effect removal -- presumptively six months. The statute, 8 U.S.C. § 1231(a)(6), stated that aliens who are removable (as well as aliens who are inadmissible) “may be detained beyond the removal period.” Because “may” created ambiguity in the statute, Justice Breyer applied the Doctrine of Constitutional Avoidance to find that Congress did not intend the “serious constitutional threat” of an authorization for indefinite detention.

The present case involved Mariel Cubans, who, unlike *Zadvydas*, were inadmissible, rather than removable. A Cold War-era case could be cited for the proposition that inadmissible aliens were not constitutionally protected against indefinite detention. To resolve this conflict, Justice Scalia, joined by all but Justices Thomas and the Chief Justice, elaborated on the operation of the Doctrine of Constitutional Avoidance in a manner that will be useful in many contexts. Earlier, Justice Scalia had joined in Justice Kennedy's *Zadvydas* dissent, but in this case he followed his textualist principles. He explained that the same words cannot mean different things within the same statute, rejecting "the dangerous principle that judges can give the same statutory text different meanings in different cases."

The operative language of § 1231(a)(6), "may be detained beyond the removal period," applies without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one. As the Court in *Zadvydas* recognized, the statute can be construed "literally" to authorize indefinite detention . . . , or (as the Court ultimately held) it can be read to "suggest [less than] unlimited discretion" to detain . . . . It cannot, however, be interpreted to do both at the same time.

"[B]ecause the statutory text provides for no distinction between admitted and nonadmitted aliens, we find that [*Zadvydas* controls]." Using as a foil Justice Thomas's claim in dissent that this was a stealth constitutional decision, Justice Scalia expanded on the statutory nature of the doctrine of constitutional avoidance. In an important clarification of the doctrine's scope, he explained that the constitutional doubt need not apply to the party asserting the claim: "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." To this, Justice Scalia added a citation to *Leocal*, with the explanation that the "rule of lenity" applies to a statute in both its criminal and noncriminal contexts.

Footnote 3 provides us with good authority on mootness. BICE paroled one of the Mariel Cubans just after oral argument. Because the current release could be terminated at the Secretary's discretion, the habeas petition sought greater relief than had been provided and, therefore, presented a live case or controversy.

***Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694 (2005): The removal statute does not prohibit the government from removing an alien to the country of birth even though the country has not consented to receive the alien.**

Mr. Jama was born in Somalia, came to the United States, but lost his refugee status due to a criminal conviction. He petitioned for habeas relief in order to prevent his removal to Somalia, which at the time did not have a functioning government. Justice Scalia, writing for the Chief Justice and Justices O'Connor, Kennedy, and Thomas, achieved a brutal victory for textualism, holding that 8 U.S.C. § 1231(b)(2) does not prohibit the government from removing a non-citizen who has been found ineligible to remain in the United States, to another country without the explicit, advance consent of that country's government. Because consent was required elsewhere in the statute, "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."

The Court's textual analysis employed the grammatical "rule of the last antecedent:" "[A] limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, argued on the same textual grounds that deportation to a country unable to accept the alien is not permitted by the statute. The postscript is that, after BICE's unsuccessful efforts to dump Mr. Jama on a Somalian tarmac, he is now free on conditions under the same program as the *Zadvydas* aliens.

## **Statutory Construction -- Crimes In General**

***Shepard v. United States*, 125 S. Ct. 1254 (2005): Applying the doctrine of constitutional avoidance, the Court construed the Armed Career Criminal Act to preclude a sentencing court from considering extra-judicial records to determine whether a prior conviction constituted an ACCA predicate conviction.**

Justice Souter put together the *Booker I* Justices to narrowly construe the ACCA based on the constitutional avoidance doctrine. In *United States v. Taylor*, 495 U.S. 575 (1990), the Supreme Court held that a sentencing court should employ a categorical approach to determine whether a defendant's prior state convictions are predicate felonies for purposes of the ACCA. Where the relevant statute was so broad that it does not generically establish

an ACCA predicate conviction, the Court permitted a modified categorical approach, using judicially noticeable facts to establish the elements of the offense. In *Shepard*, the Court rejected the government's argument that the court should be permitted to look outside the indictment and plea colloquy to establish the characteristics of the prior conviction. Extrajudicial records, such as police reports generated at the time of the arrest, contain facts not proven in conformance with the Sixth Amendment or admitted during a guilty plea colloquy.

For the second time, the Court applied the doctrine of constitutional avoidance to *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Although *Almendarez-Torres* allowed an exception to the Fifth Amendment for the fact of a prior conviction, the Court construed the ACCA to avoid the application of *Almendarez-Torres* to unproved and unadmitted facts underlying prior convictions. By Justice Thomas's count in his concurring opinion, a majority of Supreme Court justices now reject the holding of *Almendarez-Torres* that prior convictions are not elements subject to the Fifth Amendment right to indictment. *Shepard* (especially in tandem with *Clark v. Martinez, supra*) provides a strong reminder that federal criminal practitioners should be consistently raising the Doctrine of Constitutional Avoidance under all statutes involving prior convictions, such as the ACCA, § 1326, § 3146, and the porn statutes.

(<http://circuit9.blogspot.com/2005/09/thompson-fourth-circuit-demonstrates.html> and <http://circuit9.blogspot.com/2005/05/ngo-nobriga-two-critical-pieces-of.html>)

***Small v. United States*, 125 S. Ct. 1752 (2005): The reference to “convicted in any court” in 18 U.S.C. § 922(g) does not include foreign convictions.**

This is a classic statutory construction brawl in which the textualists take a beating. Justice Breyer, joined by Stevens, O'Connor, Souter, and Ginsburg, explained how “any court” means “domestic court.”

Gary Small was convicted in a Japanese court and sentenced to five years incarceration. Almost immediately upon his return to the United States, he purchased a gun, which resulted in prosecution for being a prohibited person in possession of a firearm based on the Japanese conviction. The majority resolved a Circuit split by starting out with the proposition that the meaning of “any” may vary depending on its context. The Court then relied on a line of cases presuming that Congress generally legislates with domestic concerns in mind. Although the presumption against extraterritorial application did not apply, a

similar assumption applied here, especially in light of the crimes that other countries deem punishable (*e.g.*, propaganda against communism in Cuba) and the lack of procedural protections in those countries (*e.g.*, diminished weight of women's testimony in some countries). Where the legislative history indicated no consideration of the question, the Court assumed that Congress intended that the phrase "convicted in any court" to apply domestically, not extraterritorially. And Justice Breyer could not resist mentioning that the Sentencing Guidelines do not count foreign convictions.

Justice Thomas, joined by Justices Scalia and Kennedy (the Chief Justice did not participate), dissented, saying that "any" meant "any." The context also supported the textual reading because the federal firearms statutes refer to "federal," "state," or "federal or state law," demonstrating Congress's ability to limit where a limitation is intended. The dissenters accuse the majority of coining a new rule that will burden Congress with specificity not previously required.

***Arthur Andersen v. United States*, 125 S. Ct. 2129 (2005): The federal crime of obstruction of SEC proceedings requires that the government prove that corrupt persuasion occurred "knowingly."**

Chief Justice Rehnquist wrote for a unanimous Court, reversing the conviction of the Arthur Andersen accounting firm for shredding documents during the Securities and Exchange Commission's investigation of Enron. The firm instructed its employees to destroy documents pursuant to a document retention policy as Enron's financial problems became public. The jury instructions should have required that the element of "corrupt persuasion" under the statute be committed "knowingly." In construing the statute, the Chief Justice, for the second time this Term (*Leocal* being the first), relied on the "ordinary" and "natural" meaning of the words as an interpretive guide. The most natural reading of the statute, as well as the *mens rea* usually required for criminal liability, required conscious wrongdoing. Additionally, the Court held that the statute required a nexus between the knowingly corrupt persuasion and a foreseeable official proceeding. The Court found that the district court's jury instructions were deficient because they did not communicate the required *mens rea* nor the required nexus.

***Whitfield v. United States*, 125 S. Ct. 687 (2005): Because the text of the money laundering conspiracy statute does not expressly make the commission of an overt act an element, the government need not prove an overt act to obtain a conviction.**

Writing for a unanimous Court, Justice O'Connor held that a conviction for conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) does not require proof of an overt act in furtherance of the conspiracy. The petitioners were convicted of conspiracy to launder money after the trial judge denied their request to instruct the jury that the Government was required to prove beyond a reasonable doubt that at least one of the co-conspirators had committed an overt act in the furtherance of the conspiracy. The analysis began with the rule that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms. Common law conspiracy, unlike 18 U.S.C. § 371, included no overt act. In *United States v. Shabani*, 513 U.S. 10 (1994), the Court upheld the drug conspiracy statute's failure to require proof of an overt act. The similarly phrased money laundering statute required the same result: where the text does not create an overt act element for conspiracy, the common law rule allows conviction with no such proof.

***Pasquantino v. United States*, 125 S. Ct. 1766 (2005): The federal wire fraud statute includes schemes to defraud a foreign government of tax revenue despite the common law "revenue rule," which bars federal involvement in foreign governments' collection of taxes.**

Justice Thomas, joined by the Chief Justice and Justices Stevens, O'Connor, and Kennedy, applied the plain meaning of "property" to include valuable entitlements like excise taxes. The Court again followed its *Leocal* decision for the requirement of giving "words their ordinary and natural meaning." The defendants were prosecuted for wire fraud, in violation of 18 U.S.C. § 1343, for scheming to smuggle liquor from the United States into Canada to avoid higher taxes in Canada. The Circuits were split on whether such a prosecution was barred by the common law "revenue rule," which states that federal courts are not bound to enforce foreign judgments for taxes, fines, or penalties. Justice Thomas found that the plain meaning of "property" included the excise taxes. The canon of construction of statutes in derogation of the common law was not controlling because the statute is clear and the common law rule did not clearly cover this type of conduct.

Justice Ginsburg's dissent, joined by Justices Breyer, Scalia, and Souter, found silence in the statute on the extraterritorial issue and, echoing the decision in *Small*, would presume

against application to foreign revenue collection. The Guidelines' use of lost Canadian revenues to establish loss demonstrated the involvement of the "revenue rule." In footnote 4, the dissent criticized the sentencing proceedings. The lack of any serious effort to untangle the loss question was "in derogation of the Government's and the court's shared obligation to ensure that the calculations potentially affecting a defendant's sentence are as accurate as possible . . . and suggest[ed] that the Government was unprepared to grapple with the details of foreign revenue laws."

The majority also declined to vacate the defendants' sentences under *Blakely*. The defendants had raised the *Blakely* challenge in a footnote to the Opening Brief. But the majority refused to address the claim because it was not raised in the petition for certiorari. In footnote 5, the dissent disagreed, explaining that the defendants still have play under *Booker* because they raised the issue as soon as possible. Furthermore, the rule regarding not considering issues left out of the petition is prudential, not jurisdictional.

## **Habeas Procedure**

***Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005): State prisoners may bring a § 1983 suit challenging the constitutionality of state parole procedures.**

Two state prisoners brought a § 1983 action challenging state parole procedures as unconstitutional and seeking declaratory and injunctive relief. The federal district court held that this type of claim must be brought as a petition for habeas corpus. The Supreme Court disagreed. The Court held that state prisoners may bring a § 1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures. Justice Breyer, writing for the eight-justice majority, found that the state prisoners were not required to seek relief exclusively under federal habeas statutes. Justice Breyer reviewed the Court's prior case law and concluded that § 1983 actions are barred only if success in the § 1983 claim would *necessarily* demonstrate the invalidity of confinement or its duration.

Justice Scalia, joined by Justice Thomas, concurred to emphasize that § 1983 jurisdiction applied because the claims would not necessarily spell speedier release, and thus neither claim fell within the core of habeas corpus. They also believed that a contrary holding would unduly expand habeas corpus because the habeas statute does not authorize federal courts to "order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody." *Id.* at 1250 (Scalia, J., concurring).

In this case, the petitioners sought a new parole hearing that may or may not result in release, along with other procedures that fall outside the scope of habeas relief. Justice Kennedy dissented and expressed concern that parole cases would be brought under § 1983 to circumvent habeas procedures.

***Howell v. Mississippi*, 125 S. Ct. 856 (2005): Petitioner did not “fairly present” his constitutional claim by citing to a case in his brief that cited to a case citing the Supreme Court’s on-point decision.**

The Court per curiam dismissed its writ of certiorari as improvidently granted. In his brief to the Mississippi Supreme Court, Mr. Howell challenged his conviction for capital murder on the basis that the trial court erred when it refused to give the instruction for a lesser included offense of simple murder or manslaughter. However, Mr. Howell failed to present his claim as arising under federal law. Citing *Baldwin v. Reese*, 541 U.S. 27 (2004), the Court rejected Mr. Howell’s claim as a “daisy chain,” because it “depends upon a case that was cited by one of the cases that was cited by one of the cases that petitioner cited ....” Mr. Howell also argued that the federal claim was fairly presented by his reference to the state rule on lesser included offenses. Because the Court found that the two standards were different, it refused to decide whether the claim would have been properly presented if the state law rule was identical. Even if the Court did have jurisdiction, the Court concluded the writ was improvidently granted because the issue had not been decided by the state court.

***Rhines v. Weber*, 125 S. Ct. 1528 (2005): Where the petitioner has a mixed petition of exhausted and unexhausted claims, the federal courts can grant a stay and hold a federal habeas corpus petition in abeyance while the petitioner exhausts the claims in state court upon a determination that (1) the petitioner’s failure to exhaust his claims first in state court is excused by good cause, and (2) the claims are not plainly meritless.**

Justice O’Connor wrote the Court’s opinion in light of the AEDPA, revisiting the procedural hurdles she constructed in the early 1980’s. The “total exhaustion” rule of *Rose v. Lundy*, 455 U.S. 509 (1982), created a tension with the AEDPA’s one-year statute of limitations because the statute of limitation is not tolled during the pendency of the federal petition (*Duncan v. Walker*, 533 U.S. 167 (2001)).

[P]etitioners who come to federal court with “mixed” petitions run the risk of forever losing their opportunity for any federal review of their unexhausted

claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review.

The Court determined that stay and abeyance should be available, but only in “limited circumstances,” that is, when the “district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.” Furthermore, the district court may impose time limits on the petitioners trip back to state court. However, when these conditions are met, and there is no evidence that the petitioner has engaged in intentionally dilatory tactics, denial of the stay would likely be an abuse of discretion.

In a concurring opinion, Justice Stevens, joined by Justices Ginsburg and Breyer, warned that “good cause” should not be interpreted to impose the sort of strict and inflexible requirement that would trap the unwary pro se prisoner. Likewise, Justice Souter, joined by Justices Ginsburg and Breyer, concurred specially to say that stays should be available if the State has not presented proof of intentionally dilatory litigation tactics (shades of *Fay v. Noia*, 372 U.S. 391 (1963)). Otherwise, Souter warned, the “trickiness of some exhaustion determinations promises to infect issues of good cause when a court finds a failure to exhaust; pro se petitioners (as most habeas petitioners are) do not come well trained to address such matters.”

***Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005): Under the AEDPA, a state petition that is ultimately dismissed as untimely does not qualify as “properly filed” for purposes of tolling the statute of limitations period for federal habeas corpus filing.**

Chief Justice Rehnquist, joined by Justices O’Connor, Scalia, Kennedy, and Thomas, resolved the question left open in *Artuz v. Bennet*, 531 U.S. 4 (2000): whether the filing of a state court petition, although ultimately dismissed as untimely, will toll the statute of limitations even in a state where “certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed.” The petitioner argued that timeliness is not a filing condition when it must be examined on a claim-by-claim basis. The Court concluded that the test of 28 U.S.C. § 2244(d)(2) precluded this argument because it refers not just to a “properly filed application,” but more specifically to “a properly filed application . . . with respect to the pertinent judgment or claim.” In an echo of his *Leocal* and *Arthur Anderson* opinions, the Chief Justice is guided by common usage and common understanding of “properly filed.” As it previously intimated in *Carey v. Saffold*, 536 U.S.

214 (2002), the Court in *Pace* held that, “when a post-conviction petition is untimely under state law, that is the end of the matter for purposes of § 2244(d)(2).”

The Court referred to the filing of a “protective” petition as approved in *Rhines* to protect against unfairness: “A petitioner’s reasonable confusion about whether a state filing would be timely will ordinarily constituted ‘good cause’ for him to file in federal court.”

The Court then considered whether Mr. Pace established the two elements of equitable tolling: 1) that he had been pursuing his rights diligently, and 2) that some extraordinary circumstance stood in his way. Although he argued that state law and Third Circuit exhaustion law created a trap, the Court did not need to rule because he delayed in raising the issues. And in a footnote, the Court reserved the question whether equitable tolling applied to the AEDPA’s statute of limitations at all.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented because “properly filed” ordinarily refers to the process of delivering the paper to the clerk, not timeliness, and because the statutory context and purposes of § 2254(d)(2) support this reading. The Ninth Circuit has overruled its inconsistent authority in this area based on *Pace*. *Bonner v. Carey*, 2005 WL 2456932 (9th Cir. Oct. 6, 2005).

***Dodd v. United States*, 125 S. Ct. 2478 (2005): The statute of limitations under 28 U.S.C. § 2255 begins to run from the date on which the Supreme Court initially recognizes a new right, not from the date the right is declared retroactive.**

Justice O’Connor wrote for the five-justice majority in this case, holding that the plain text of the statute was conclusive: “We ‘must presume that [the] legislature says in a statute what it means and means in a statute what it says there.’” 125 S. Ct. at 2482 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The statute identified the date from which the statute of limitations would be measured as “the date on which the right asserted was initially recognized by the Supreme Court.” The qualifying clause provides that the statute of limitations runs from that date “if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.” The Court rejected the petitioner’s claim that the statute of limitations does not begin to run until the provisions in the qualifying clause are met. Such a reading “does not square with the natural” reading of the text. Instead, the qualifying clause merely imposes a condition on the

applicability of the statute and it does not change the date of which the limitations period begins to run.

The Court recognized that its interpretation of the statute had “the potential for harsh results in some cases,” because “an applicant who files a second or successive motion seeking to take advantage of a new rule of constitutional law will be time barred” unless the Court made the rule retroactive within one year. Nevertheless, the Court held that it was not free to rewrite the statute that Congress enacted. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented because the majority’s interpretation of the text would allow the limitations period to expire before the cause of action accrued.

***Johnson v. United States*, 125 S. Ct. 1571 (2005): Where the predicate prior conviction for a sentence or conviction is vacated, the AEDPA’s one-year habeas statute of limitations begins to run on the date that a petitioner receives notice of the order vacating the prior conviction if the petitioner sought the vacatur with “due diligence.”**

Mr. Johnson received a career offender sentence on federal drug conspiracy charges, then successfully challenged a predicate state conviction. Given that the government “all but conceded” that the “fact” of vacatur restarts the § 2255 time for filing, the Court’s unanimous agreement is no surprise, especially in light of *Custis v. United States*, 511 U.S. 484 (1994), which assumed such a remedy in shutting down litigation regarding priors in the federal sentencing hearing. But look at the fascinating split on the creation of an additional “due diligence” requirement.

Justice Souter, joined by the Chief Justice, O’Connor, Thomas, and Breyer, are concerned that treating the vacatur as a fact triggering the statute of limitations, with no judicial gloss, would thwart the AEDPA’s purpose of preventing delay. They read a “due diligence” requirement into the statute, then find no excuse for the three-year delay in Mr. Johnson’s case, rubbing this salt into the wound: “[W]e have never accepted pro se representation alone or procedural ignorance as an excuse for prolonged inattention when a statute’s clear policy calls for promptness . . . .”

Justice Kennedy, joined by Justices Stevens, Scalia, and Ginsburg, find the ruling inconsistent with the statute’s text, the State’s role in setting their own statutes of limitations, and defense counsel’s obligation to expend resources on discovering grounds for challenges

earlier than otherwise required. The dissenters see the new “due diligence” requirement as an addition to the statute’s text and a new and expanding area for future litigation.

***Mayle v. Felix*, 125 S. Ct. 2562 (2005): The AEDPA’s statute of limitations applies to claims added to a timely petition after the statute ran because Fed. R. Civ. P. 15(c) does not permit relation back of expired habeas claims.**

Two errors at Felix’s trial became part of his federal habeas case. The first was a Fifth Amendment self-incrimination claim, based on Mr. Felix’s statements made during police interrogation. The second was a Sixth Amendment confrontation claim based on the admission of videotaped statements made by witness Kenneth Williams. Mr. Felix pursued the Confrontation Clause claim through every step of the California state process. But after his direct appeal to the California Court of Appeals, he never again raised the Fifth Amendment claim.

When he filed his federal habeas petition, he had about two and one half months left of his one-year statute of limitations. His *pro se* petition only raised the confrontation claim. Eight months later, his appointed counsel filed an amended petition, which included the Fifth Amendment claim. After the state objected to the claim as unexhausted, counsel filed an exhaustion petition in the California courts. The state dropped its exhaustion argument, but challenged the new claim as untimely.

Justice Ginsburg, writing for the Chief Justice and Justices O’Connor, Scalia, Kennedy, Thomas, and Breyer, found that the Fifth Amendment claim was untimely despite Fed. R. Civ. P. 15(c), which allows “amendment of a pleading to relate back to the date of the original pleading when . . . the claim or defense in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” The Court found that Habeas Rule 2(c)’s requirement of initial notice of claims trumped normal civil rules, despite 28 U.S.C. § 2242’s specific provision for habeas amendments “as provided in the rules of procedure applicable to civil actions.” In the habeas context, “conduct, transaction, or occurrence” is not the trial, conviction, or sentence.

The Court does not define specifically what “conduct, transaction, or occurrence” is in a habeas proceeding, but it provided some examples. Relation back is allowed 1) when the claims added by amendment arise from the same core facts as the timely filed claims, but not when the new claims depend upon events separate in ‘both time and type’ from the

originally raised episodes;” 2) “when the new claim is based on the same facts as the original pleading and only changes the legal theory;” and 3) for “an amendment offered to clarify or amplify the facts already alleged in support of a timely claim . . . .” Under a more expansive construction, the “AEDPA’s limitation period would have slim significance.” Justice Souter, joined by Justice Stevens, dissented based on the text of Rule 15(c) and the disparity created between wealthy and indigent petitioners because retained counsel is better able to file complete petitions.

***Bell v. Thompson*, 125 S. Ct. 2825 (2005): The Sixth Circuit abused its discretion when it did not enter the mandate after the denial of certiorari (as required by Fed. R. App. P. 44(d)(2)(D)) and then waited for over five months to withdraw its opinion without issuing an order indicating that it was revisiting its prior opinion.**

Justice Kennedy, joined by the Chief Justice and Justices O’Connor, Scalia, and Thomas, construed Fed. R. App. P. 41(d)(2)(D), which calls for immediate issuance of the mandate upon denial of certiorari, to allow only narrow exceptions permitted under *Calderon v. Thompson*, 523 U.S. 538 (1998).

Mr. Thompson filed a federal petition for a writ of habeas corpus for ineffective assistance of counsel, challenging his death sentence. The district court dismissed the petition, and the Sixth Circuit affirmed. Thompson requested rehearing in the Court of Appeals, and rehearing was denied. After the Supreme Court denied certiorari and a petition for rehearing, the State set an execution date and proceeded to enforce the sentence, even though the mandate had not issued. Five months later, the Sixth Circuit issued an amended opinion remanding the case to the district court for an evidentiary hearing on the ineffective assistance of counsel claim.

The Court held that, whatever the authority to retain the mandate, the Sixth Circuit abused its discretion by delaying for that length of time and without notifying the parties, especially given the AEDPA interest in finality. Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented, based on the 30,000 word opinion by a circuit judge who found a document he believed demonstrated a miscarriage of justice.

***Gonzales v. Crosby*, 125 S. Ct. 2641 (2005): Under the AEDPA, Rule 60(b) motions are not automatically considered to be “second or successive” petitions.**

Justice Scalia, joined by the Chief Justice and Justices O’Connor, Kennedy, Thomas, Ginsburg, and Breyer, rejected the Eleventh Circuit’s position that, except for fraud, a Rule 60(b) motion to reopen the case is a “second or successive” petition. But Mr. Gonzales lost on the merits. Whether a motion will be considered a second or successive petition depends on the substance of the Rule 60(b) motion. When the motion contains “claims,” then the motion is “in substance a successive habeas petition and should be treated accordingly.” For example, a motion involves a claim if it alleges that a failure to include the claim resulted from excusable neglect, if it seeks leave to present newly discovered evidence, or if it contends that a change in law justifies relief.

If, however, the motion “attacks, not the substance of the federal court’s resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings,” the second and successive rules do not apply. A claim that the federal courts misapplied the statute of limitations may properly be brought as a 60(b) motion. To limit the friction between Rule 60(b) and AEDPA, three factors come into play: the motion must be made within a reasonable time; the movant must show “extraordinary circumstances” to justify relief; and Rule 60(b) motions have limited appellate review. Unfortunately for Mr. Gonzales, “extraordinary circumstances” did not include *Artuz v. Bennett*, 531 U.S. 4 (2000), which established that the district court’s procedural dismissal of his petition was in error.

Footnote 9 distinguishes substantive changes in criminal law: “A change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment, particularly in the criminal context.” 125 S. Ct. at 2650 n.9 (citing *Bousley v. United States*, 523 U.S. 614 (1998) and *Fiore v. White*, 531 U.S. 225 (2001)). Based on *Bousley* and *Fiore*, we should argue that retroactive application of the post-*Apprendi* interpretation of the federal drug law is required.

## Habeas Substance

***Rompilla v. Beard*, 125 S. Ct. 2456 (2005): Counsel’s failure to review the defendant’s file from a prior rape and assault conviction constituted ineffective assistance of counsel when the attorneys knew that the prosecutor intended to seek the death penalty by relying on this conviction to prove a history of violent felonies.**

Justice Souter, joined by Justices Stevens, O’Connor, Ginsburg, and Breyer, vacated a death sentence based on ineffective assistance of counsel. Even though the capital defendant’s family members and the defendant himself suggested no mitigating evidence was available, his lawyer was bound to make reasonable efforts to obtain and review material that counsel knew the prosecution would rely on as evidence of aggravation at the sentencing phase of trial.

The Court relied on *Wiggins v. Smith*, 539 U.S. 510 (2003), as support for the ineffectiveness claim. Given the notice that the prior would be at issue, obtaining the file of the earlier case was a basic requirement. The Court cited extensively to ABA guidelines regarding the minimum standards for capital representation. The file of the prior conviction contained mitigation leads “that no other source had opened up.” Given the contrast to the “few naked pleas for mercy actually put before the jury,” the potential to affect the outcome required reversal under *Wiggins*.

Justice O’Connor concurred to emphasize that the decision did not establish a per se rule regarding investigation of prior case files. Justice Kennedy, joined by the Chief Justice, Justices Scalia and Thomas, characterized the decision as just such a per se rule that, under the AEDPA, had not been previously established. The dissenters also had trouble with the serendipitous nature of the discovery of mitigation in the other files.

***Florida v. Nixon*, 125 S. Ct. 551 (2004): In a capital murder case, it was not ineffective assistance of counsel to concede guilt during the guilt-phase of the trial in order to preserve credibility during the penalty phase.**

Justice Ginsburg wrote for a unanimous Court regarding an attorney’s decision to concede guilt in order to have greater credibility to offer mitigating evidence during the penalty phase. Mr. Nixon was unresponsive to counsel’s efforts to discuss this tactical

choice. The Florida Supreme Court reversed the conviction because the functional equivalent of a guilty plea required the defendant's affirmative explicit consent.

Justice Ginsburg provided broad outlines for the decisions that are left to counsel and those that must be joined by the defendant. First, the Court found that there had not been the type of failure of counsel that presumed prejudice as outlined in *United States v. Cronin*, 466 U.S. 648 (1984). Then, the Court found that no prejudice had resulted, citing examples of capital case strategies to save a client's life (including Clarence Darrow's pleas on behalf of Leopold and Loeb). The holding of this case is somewhat limited by the unusual circumstance of the defendant's refusal to participate:

When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

***Brown v. Payton*, 125 S. Ct. 1432 (2005): The state trial court did not unreasonably apply clearly established Supreme Court precedent when it gave the capital sentencing jury a general mitigation instruction that did not specifically refer to post-crime mitigation evidence offered by the defendant.**

The defendant's mitigation in this capital case consisted primarily of his post-crime commitment to God. The California trial court provided the catch-all mitigation instruction that had previously been upheld by the Supreme Court in *Boyde v. California*, 494 U.S. 370 (1990). The instruction required jurors to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Justice Kennedy, joined by Justices O'Connor, Thomas, Scalia, and Breyer, held: "We do not think that, in light of *Boyde*, the California Supreme Court acted unreasonably in declining to distinguish between precrime and postcrime mitigation evidence."

Justice Scalia, joined by Justice Thomas, concurred because in his view the Eighth Amendment does not prohibit a court from limiting a jury's discretion to consider all mitigating evidence. In contrast, Justice Breyer concurred to say that the trial judge's decisions were erroneous under *Boyde*, but that the case nevertheless called for deference to

the reasonable conclusion of the state court judge. The dissent, authored by Justice Souter and joined by Justice Stevens and Justice Ginsburg, argued that the California Supreme Court unreasonably applied *Boyd* given the long history of ensuring that all mitigating evidence is put before a jury in a capital case.

***Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005):**

- 1. The guilty plea was knowing and voluntary because defendant's assertion that he was not the triggerman was not inconsistent with his plea to capital murder.**
- 2. Prosecutor's use of inconsistent theories to convict both the defendant and his accomplice may have amounted to a due process violation.**

The Court's actual holding in this case, that Mr. Stumpf's guilty plea was knowing and voluntary, is merely a sidebar to the real case being argued: whether the prosecutor's use of inconsistent theories to convict both the defendant and his accomplice, with the theory being that each of them was the trigger man, violated Mr. Stumpf's right to due process.

Mr. Stumpf pled guilty to aggravated murder with one capital specification. He presented mitigating evidence to a three-judge panel, attempting to prove that he was not the actual gunman. The prosecutor argued that Mr. Stumpf was the gunman, and the panel agreed. But later, when Mr. Stumpf's co-defendant, Wesley, was tried for the same crime, the prosecutor argued that Wesley was the gunman. He presented the testimony of Wesley's cellmate who said that Wesley had confessed to firing the lethal shots. Then, in response to Mr. Stumpf's motion to withdraw his guilty plea, the same prosecutor argued that the cellmate's testimony was unreliable because other evidence proved Mr. Stumpf to be the shooter.

Justice O'Connor, writing for the Court, rejected Mr. Stumpf's challenge to the validity of his guilty plea. The Court held that Mr. Stumpf's attorney had adequately advised him of the elements of the crime, and therefore Mr. Stumpf knew that he could be guilty of capital murder even if, as he claimed, he was not the gunman. However, with respect to the prosecutor's use of inconsistent theories, the question became more complex. Although the inconsistent theories did not cast doubt on the validity of the conviction, they did cast doubt on the imposition of the death penalty. Therefore, the Court remanded the case to determine

whether the prosecutor's use of inconsistent theories amounted to a due process violation, and if so, whether that violation was prejudicial to Mr. Stumpf's sentence.

The real debate occurred in the concurring opinions. Justice Souter, joined by Justice Ginsburg, noted the heightened need for reliability in capital cases and emphasized the prosecutor's duty, beyond merely winning, to ensure that justice be done. Justice Souter framed the question as whether a death sentence may be allowed to stand "when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a co-defendant." In contrast, Justice Thomas, joined by Justice Scalia, framed the issue as a question of retroactivity under *Teague v. Lane*, 489 U.S. 288 (1989). If Mr. Stumpf won on the merits of his due process claim, Justice Scalia believed that the holding would constitute a new rule of law because, "[t]his Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories."

***Bell v. Cone*, 125 S. Ct. 847 (2005): The Sixth Circuit failed to accord adequate deference to the state court decision when it presumed that the Tennessee Supreme Court failed to apply a narrowing construction to the aggravating factors on direct appeal.**

In a unanimous opinion showing a high degree of deference to state court decisions, the per curiam Court held that, even if aggravating factor instructions were unconstitutionally vague, any defect was cured when the state supreme court applied a narrowed construction of the factor on review. The Court noted that the state supreme court had previously put forth a constitutionally permissible narrowed construction of the aggravating factor and that it had applied this narrowing construction "numerous times." Under these circumstances, even though the state supreme court did not state that it was applying a narrowing construction in this case, the federal court must accord deference and presume that the state supreme court followed its own precedent.

In concurrence, Justice Ginsburg, joined by Justice Souter and Justice Breyer, clarified that deference to the state court, absent a citation or explicit mention of the narrowing construction, is only required when the state supreme court has previously confronted and decided the issue in a prior ruling, as was the case here. The case should not stand as precedent for "an assumption that the state court, *sub silentia*, considered the issue and resolved it on the merits in accord with the State's relevant law."

In footnote 6, the Court found that, because *Ring v. Arizona*, 536 U.S. 584 (2002), is not retroactive, the question remains open whether an appellate court, as opposed to a jury, can cure the finding of a vague aggravating circumstance by applying a narrower construction.

***Miller-El v. Dretke*, 125 S. Ct. 2317 (2005): The state court’s factual finding that the prosecution had race-neutral reasons for excusing 10 of 11 black venirepersons was incorrect by clear and convincing evidence.**

Mr. Miller-El’s case was on direct appeal when the Supreme Court decided *Batson v. Kentucky*, 576 U.S. 79 (1986). On remand, the trial court accepted the prosecutor’s race-neutral justifications for the strikes. In Mr. Miller-El’s first trip to the Supreme Court, Justice Kennedy wrote a masterful opinion demonstrating that a certificate of appealability should issue, stating that the merits of Mr. Miller-El’s *Batson* claim were debatable by jurists of reason: “[D]eference does not imply abandonment or abdication of judicial review.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

The Texas courts, despite Justice Kennedy’s marshaling of the facts, denied relief. His second time before the Supreme Court, Mr. Miller-El won on the merits of his *Batson* claim. To reach this result, the Court necessarily had to conclude that the trial court’s conclusion was “an unreasonable determination of the facts in light of the evidence presented . . . .” 28 U.S.C. § 2254(e)(1). Justice Souter, joined by Justices O’Connor, Kennedy, Ginsburg, and Breyer, looked to the bare statistics of exclusion (91%), the fact that black panelists were excluded while similarly situated white panelists were not, the different questioning of black veniremembers, and the Dallas County D.A office’s decades-long policy of excluding black jurors. In light of these facts, the State’s denial of the claim was unreasonable.

Justice Breyer concurred to join Justice Thurgood Marshall’s plea for abolition of peremptory challenges. Justice Thomas, writing for the Chief Justice and Justice Scalia, parsed the facts to find no discrimination problem.

A lurking habeas problem is exposed in footnote 15 of the majority opinion. The federal district court developed facts to support the discrimination claim, apparently without objection. This is consistent with *Vasquez v. Hillary*, 474 U.S. 254 (1986), in which the federal district court accepted statistical evidence of grand jury discrimination under Habeas

Rule 7. But in an earlier per curiam decision in which Rule 7 was not at issue, the Court stated that federal courts should be limited to the evidence that was before the state courts except when the evidence meets the standard for an evidentiary hearing. *Holland v. Jackson*, 542 U.S. 649 (2004). In *Cooper-Smith v. Palmateer*, 397 F.3d 1236 (9th Cir. 2005), the Ninth Circuit extended this dicta to Rule 7, thereby obliterating Rule 7's significance. The *Miller-El* dissent attempts to extend the *Holland* dicta (even though footnote 4 of *Booker* accords little weight to decisions like *Holland* that are decided without briefing). The dissonance of footnote 15 needs to be resolved to revive Rule 7.

***Medellin v. Dretke*, 125 S. Ct. 686 (2005): Writ of certiorari dismissed in favor of ongoing state court proceedings.**

Mr. Medellin challenged his capital conviction on the basis that Texas failed to notify him of his right to consular access as required by the Vienna Convention. While his federal habeas petition was on appeal, the International Court of Justice issued an opinion declaring that the United States had violated Mr. Medellin's rights under the Vienna Convention. President Bush thereafter issued a memorandum directing state courts to give effect to the ICJ decision "in accordance with general principles of comity . . . ." Relying on the President's memorandum, Mr. Medellin filed a habeas corpus petition in state court. Because Medellin may receive relief in state court, the per curiam Court dismissed its writ of certiorari.